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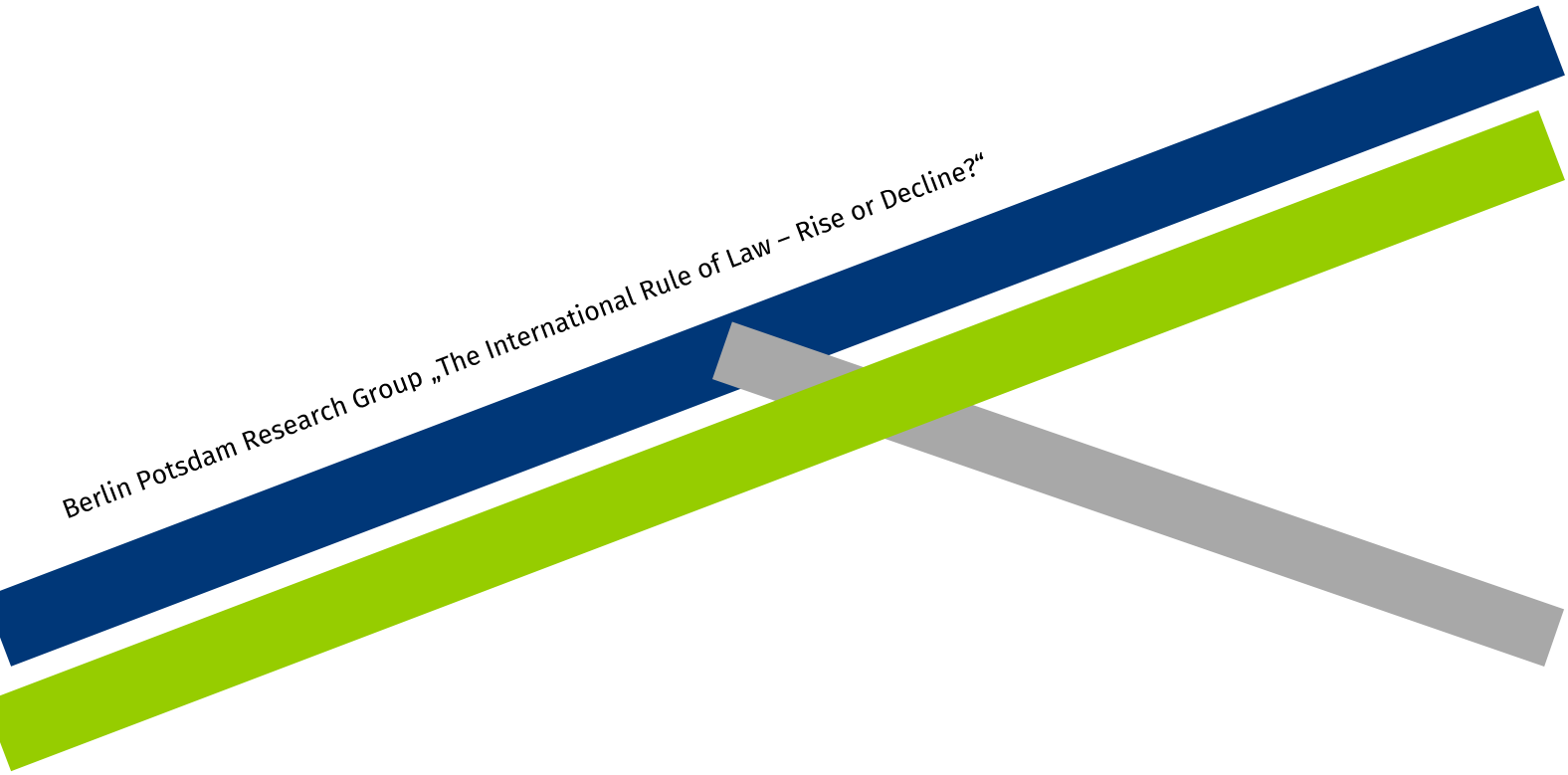

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Resurgent Authoritarianism and the International Rule of Law

Wayne Sandholtz[*]

Abstract:

Modern rule of law and post-war constitutionalism are both anchored in rights-based limitations on state authority. Rule-of-law norms and principles, at both domestic and international levels, are designed to protect the freedom and dignity of the person. Given this "thick" conception of the rule of law, authoritarian practices that remove constraints on domestic political leaders and weaken mechanisms for holding them accountable necessarily erode both domestic and international rule of law. Drawing on political science research on authoritarian politics, this study identifies three core elements of authoritarian political strategies: subordination of the judiciary, suppression of independent news media and freedom of expression, and restrictions on the ability of civil society groups to organize and participate in public life. According to available data, each of these three practices has become increasingly common in recent years. This study offers a composite measure of the core authoritarian practices and uses it to identify the countries that have shown the most marked increases in authoritarianism. The spread and deepening of these authoritarian practices in diverse regimes around the world diminishes international rule of law. The conclusion argues that resurgent authoritarianism degrades international rule of law even if this is defined as the specifically post-Cold War international legal order.

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Contents:

1. Introduction

Would the destruction of the multilateral institutions that have structured international relations for most of the last 70 years amount to a decline in the international rule of law? Or, since states are still the primary law-makers in international relations, would such a turn of events simply mean that states – at least some states – are using their sovereign prerogatives to alter the rules under which they live? That is, does the abandonment of a specific set of international rules imply a diminishing of the international rule of law? Another way of framing these questions is to ask if a return to the international legal order of 1913 or of 1939 would amount to a *weakening* of the international rule of law or simply a shift to a *different* international rule of law.

Answers to the questions posed above require a definition of the international rule of law (IROL). Approaches to defining international rule of law fall into two broad categories, "thin" and "thick." A thin conception of IROL defines it as state conformity with existing international legal rules, whatever those happen to be. A thick conception of IROL includes the normative substance of the rules, in particular, human rights-based legal limitations on state authority. Under the thick conception, IROL necessarily includes norms that protect individual freedom and dignity. The erosion of international law-based rights protections would therefore constitute a decline in international rule of law, by definition. In this essay, I argue for a thick conception of IROL and suggest that increasing authoritarianism in a growing number of states implies a decline in the international rule of law. I also suggest in the conclusion that the spread of authoritarianism is likely to erode not just the robustness of international human rights norms but also to diminish the rule of law in additional domains (security, economics, environment) that are often seen as components of the post-World War II international rule-of-law system.

Anchoring the rule of law in rights-based limitations on state power enables me to identify a set of domestic practices that would, as they spread and deepen, erode the international rule of law. I argue that the resurgent authoritarianism visible in diverse parts of the world among regimes of varying types – democratic, autocratic, and hybrids – entails a set of domestic practices that undermine constraints on state power in ways that endanger the basic rights and freedoms at the heart of modern rule of law, domestic and international. Political science research has identified, with a notable degree of consensus, the core of authoritarian political strategies. That core consists of the subordination of the judiciary, suppression of independent news media and freedom of expression, and restrictions on civil society groups (including NGOs). Finally, I summarize available empirical evidence of the extent to which these IROL-corroding practices are expanding.

The assessment developed here makes the following claim: that domestic rule of law is directly and integrally connected to international rule of law, through substantive values and norms that are foundational to both domestic and international legal orders. These norms and values aim for the protection of individual dignity, rights, and freedoms and consequently create boundaries on government power. The erosion of domestic, rights-oriented rule of law therefore directly weakens international rule of law to the extent that an increasing share of states dismantle key mechanisms for limiting government powers.

2. International rule of law

Definitions of the rule of law (ROL), generally advanced in the context of domestic politico-legal orders, tend to focus on three basic criteria. Though the terminology varies, three components define the rule of law: (1) the powers of government can only be exercised through law, (2) the law applies to the state and its officials, and (3) the law must apply equally to all (Chesterman 2008, 342; Hurd 2015b). There is less consensus in defining international rule of law. Definitions, however, tend to divide into either "thick" or "thin" conceptions.[1]

Hurd offers a thin conception, in which IROL is a political tool or an element of political strategy. For Hurd, international ROL is the "the idea that all state behaviour should conform to whatever international legal obligations relate to it" (Hurd 2015a, 391). Thus "[l]aw is the language that states use to understand and explain their acts, goals, and desires" (Hurd 2015a, 391). International rule of law exists to the extent that states engage in the practice of legal justification (Hurd 2015a, 367). This is a thin conception of the rule of law because it emphasizes formal legality – and justificatory practices within its framework – without tying it to particular substantive values, like human rights (Hurd 2015a, 375). Hurd argues that IROL cannot consist of limits on the powers of national governments because there is no international government to enforce such limitations and because states can choose which limitations on their powers to accept (Hurd 2015a, 391). But this position immediately runs into difficulties. First, international law (IL) itself exists and functions in the absence of an international government to enforce it; an international enforcement power cannot therefore be a prerequisite for either international law or IROL. Second, in modern international law, states need not make explicit choices in order to be obligated under international law. On the contrary: states must make an explicit and sustained effort ("persistent objection") in order *not* to be bound by norms of customary international law. And *jus cogens* norms permit no exceptions or opt-outs at all.[2] Finally, even in domestic orders, fundamental legal norms – including many constitutional norms – are not and cannot be enforced in the way that Hurd expects of IROL. Hurd is thus right to show that legal justification is a form of power and to affirm that law "shows its power" as states seek to behave in ways that can be justified under international law (Hurd 2015a, 367). But this is a framework for observing the political use that states (and other actors) make of international law and for assessing the effects of that usage; it is not a theory of the international rule of law.

Thin conceptions, like Hurd's, posit rules for states, or "inter-state" law; they privilege state sovereignty and sovereign prerogatives. International rules allow states to coexist, to pursue their interests as they define them, and to engage in mutually beneficial transactions. International rules constrain states,[3] but only to the extent necessary to maintain the sovereign state system. The character of national governments and of their relationship to the population are IL-irrelevant, in the thin conception of IROL. A thin version of international rule of law has been approximated historically, in the pre-Charter era and (even "thinner") in the nineteenth century.

[1] A similar polarity is visible in concepts of the domestic rule of law, the classic example being the contrast between the approaches of Carl Schmitt (thin) and Hans Kelsen (thick).

[2] Of course, the existence and character of such norms remain controversial.

[3] As Nardin points out, international law must constrain states; otherwise, there may be international law but not international rule of law: "The international rule of law exists to the extent that states conduct their relations on the basis of laws that limit and not simply enable policy" (Nardin 2008, 400).

For theorists advancing thicker notions of international rule of law, the thin version does not count as rule of law. International rule of law must be more than a system of rules that allows states to pursue their interests. Palombella argues that rule of law cannot "coincide with the mere existence of a legal order . . . in the absence of any other qualifications. . ." (Palombella 2009, 454). Instead, the rule of law requires democracy "paired with fundamental rights." Rule of law defined in these terms can be implemented "within the municipal constitutional domain or in the international sphere" (Palombella 2009, 461). Nardin similarly argues that the rule of law should not be confused with the existence of laws: "The expression 'rule of law' does no intellectual work if any effective system of enacted rules must be counted as law, no matter what its moral qualities" (Nardin 2008, 394). And the moral qualities of the rule of law must include rights: "The expression 'rule of law' . . . should be used only to designate a kind of legal order in which law both constrains decision-making *and protects the moral rights of those who come within its jurisdiction*" (Nardin 2008, 397, emphasis added). At least in the post-1948 era, "those who come within [the] jurisdiction" of international law are all of the people of the world, not just through states but as persons.

In this essay, I adopt a substantive, rights-based conception of IROL. Krieger and Nolte likewise employ a "thicker" conception of IROL in which "international law [has shifted] from an emphasis on state-oriented principles . . . towards a more value-based order which is operationally capable of protecting and serving the individual" (Krieger and Nolte 2016, 13). In today's world, IROL involves "a substantive normative standard as a point of reference," including "the recognition and interpretation of universal value-based rules and principles which protect individual persons" (Krieger and Nolte 2016, 17, 13). However, Krieger and Nolte employ the term "international rule of law" to denote the totality of international law as it has developed since the end of the Cold War, including rules for trade, investment, the environment, the use of force, human rights, and so on (Krieger and Nolte 2016, 9). In other words, they identify IROL with the substantive legal regimes in place since roughly 1990. I share with Krieger and Nolte a thick conception of IROL. However, instead of grounding IROL in specific systems of legal rules (the post-1990s international legal order), I anchor it in normative commitments that are at once more abstract and more foundational: rights-based limits on government power. The next section justifies that choice. In the conclusion, I return to Krieger and Nolte's conception of IROL to argue that resurgent authoritarianism also erodes international rule of law as they define it.

3. Human rights, the rule of law, and constitutionalism

The definition of IROL adopted in this paper privileges human rights. Rights-based limitations on state authority, enshrined in international law, are – I will argue – foundational to the international rule of law. One potential objection to this conception is that it is possible for relations among states to be structured and guided by international legal rules, across diverse domains, regardless of the nature of domestic regimes. Put differently, authoritarian states are capable of conforming to international legal regimes on the use of force, the conduct of war, trade, investment, refugees and migration, and the environment. It is therefore possible, in principle, for a particular constellation of international legal rules to regulate international affairs even if a significant (or even growing) share of states in the world is authoritarian. Authoritarian governments can (and do) live by WTO rules, refrain from the illegal use of force, adhere to international environmental accords, and so on. Why would a world of international-law-abiding authoritarian states not be an international rule-of-law world? Under a thin conception of IROL, it might be. But in the post-1945 world, I will argue, the thin conception of rule of law is no longer adequate. Modern theories of the

rule of law and of constitutionalism converge in placing human dignity, freedom, and rights at the core of all other state obligations. States should engage in rule-governed trade because it can raise the well-being of their people. States should refrain from the use of force because wars destroy the rights and freedoms of people. States should protect the environment in order to safeguard the lives and opportunities of their people. In the conclusion, I revisit the notion that a world of authoritarian states could also be a world in which states live by international rules regulating trade, investment, the use of force, environmental protection, and so on. I will suggest that there are reasons to expect that the rise of authoritarianism would also undermine international rules in these other domains.

a) International rule of law

Domestic rule-of-law concepts cannot be transplanted directly into the international field. As Hurd puts it, "[T]he international rule of law cannot simply be derived from the domestic version, because the two rest on unique historical and political foundations" (Hurd 2014, 40; Hurd 2015a). Many others have noted that it would be inappropriate to analogize the state under international rule of law to the individual under domestic rule of law (Waldron 2006, 21). At the domestic level, individual rights must be protected from encroachments by the state, but it would be meaningless to theorize IROL based on the need to protect the rights of individual states from a non-existent world government. Nevertheless, a core purpose of the domestic rule-of-law – to establish limits on the powers of government – is also central to modern international law. Modern international law sets boundaries to state powers, in the form of international human rights law. Core international human rights norms have been accepted by virtually all states and seriously rejected by none (though of course states continue to disagree about the priority to be afforded different rights or about the interpretation of universal rights in specific instances). Indeed, one of the great shifts in international law post-World War II is that sovereign prerogatives are bounded, with the consequence that how states treat people under their jurisdiction is no longer solely a matter of domestic policy. In the era of human rights law, domestic rule of law and international rule of law thus share the objective of building legal limits to state power so as to protect individual rights and freedoms.

Waldron has advanced a particularly forceful version of this argument. He argues that "[t]he real purpose of IL and, in my view, of the ROL in the international realm is not the protection of sovereign states but the protection of the populations committed to their charge" (Waldron 2011, 325). Waldron makes the case, adopting Kant's terminology, that states "are not ends in themselves, but means for the nurture, protection, and freedom of those who are ends in themselves. This is acknowledged in the philosophy of municipal law, when it is said that the state exists for the sake of its citizens, not the other way around" (Waldron 2006, 24). The well-being of billions of people, including fundamentally their freedom and dignity, "not the well-being of sovereign nation-states, is the ultimate end of IL" (Waldron 2011, 325). Waldron's thick version of IROL begins to sound like international constitutionalism. Indeed, he offers a reoriented domestic analogy: the relationship of states to IL is like the relationship of domestic governing institutions to constitutional law (Waldron 2011, 328).

b) Global constitutionalism

The foregoing conception of IROL shares common ground with some theories of global constitutionalism. As McLachlan rightly notes:

> [M]uch of the structure of contemporary international law — especially in the great multilateral conventions of near-universal application — has a constitutional character. These conventions provide a general structure for the organisation and exercise of public power on the international plane. They were intended by their framers to be virtually immutable, because they establish fundamental principles of the international legal order within which states are to operate (McLachlan 2018, 422-423).

Other theorists posit a rights-based constitutionalism underlying general international law of a "constitutional character." Post-war constitutionalism sought to remedy a central defect in the traditional domestic constitutional theory, catastrophically demonstrated in the era of fascism, which was that it could accommodate majoritarian repression. Constitutions designed after World War II sought to erect legal barriers to acts of the majority that would trample or destroy the rights, freedoms, and dignity of minorities, whether those minorities are defined along ethnic, racial, religious, linguistic, political, or any other lines. Hans Kelsen provided the theoretical armature for this new generation of constitutionalism. In Kelsen's model, constitutions do not just create and allocate the powers of the state, they also limit the powers of the state. The state, even when backed by the will of a majority, must not act in ways that violate basic rights.

Modern constitutionalism thus incorporates supra-constitutional principles and norms, grounded in the rights, freedoms, and dignity of the individual person. These principles and norms are supra-constitutional in that they cannot be nullified, not by legislation enacted pursuant to the constitution and not even by amendment of the constitution itself. Thus modern constitutionalism incorporates substantive norms on individual rights and freedoms. It features three core elements: "(1) an entrenched, written constitution, (2) a charter of fundamental rights, and (3) a mode of constitutional judicial review to protect those rights" (Stone Sweet 2012, 816). Moreover, in contemporary constitutions the charter of rights typically comes first, before the definition of the branches of government and the allocation of powers among them. The new constitutional model appeared first in post-war Western Europe and by the 1990s had spread to most of the world (Stone Sweet 2012; Law and Versteeg 2011). Stone Sweet observes that all of the 106 constitutions established since 1985 include a charter of rights and 101 of them include a mechanism of judicial rights review (Stone Sweet 2012, 816, fn. 812).

In what way is it appropriate to carry notions of modern domestic constitutionalism to the international level? Global constitutionalism necessarily differs from the domestic model in that it does not establish a supreme authority, is not supported by the coercive apparatus of a state, and is not grounded in a particular *demos* (Kumm 2009, 260). But modern constitutionalism shares with modern IROL an essential core: that individual rights and freedoms set boundaries to the powers of the state. As argued above, modern international rule of law includes universal limitations on the powers of the state, not just vis-à-vis each other but also with respect to individual persons under their jurisdiction. Thus global constitutionalism is defined by the feature that distinguishes modern domestic constitutionalism: rights-based limits on state powers. Indeed, Gardbaum views the international human rights system as a stage "in the historical development of the idea of constitutionalism" (Gardbaum 2009, 255).

The term "constitutionalism" thus applies appropriately to the global level in that, as defined here, global constitutionalism serves the same essential purpose as modern domestic constitutionalism: "legal limits [on state power] are now imposed by international law" (Gardbaum 2009, 255). Furthermore, the international human rights system provides the substance of global constitutionalism by affirming that human rights norms apply to all people "as rights of human beings rather than as rights of citizens" (Gardbaum 2009, 257). To be sure, modern constitutionalism and the international human rights regime co-evolved in the decades after 1948, the year in which the new U.N. General Assembly approved the Universal Declaration of Human Rights (UDHR). Indeed, international human rights law has had a clear and demonstrable effect on the domestic constitutionalization of rights (Versteeg 2015). The rights enumerated in national constitutions overlap with the rights identified in the UDHR far more since 1948 than before (Elkins, Ginsburg et al. 2013, 77, 79, 80; Beck, Meyer et al. 2017, 10; Sloss and Sandholtz 2019).[4] And the degree of overlap rose dramatically in the decades after the UDHR: the average number of UDHR rights in constitutions in 1947 was 11.5; by 2005 it reached a peak of 30.6 (Sloss and Sandholtz 2019).

In this section, I have sought to establish foundations for the analysis that will follow.

The essentials are the following:

> 1. Modern conceptions of the rule of law, both domestic and international, require that the powers of the state be limited by individual rights.
>
> 2. Modern conceptions of the rule of law – domestic and international – are virtually coterminous with modern constitutionalism, which is also grounded in universal human rights principles and norms that limit the powers of the state.
>
> 3. Because rights-based limitations on state power must first and primarily be given effect by domestic institutions and legal orders, IROL necessarily has domestic foundations.[5]
>
> 4. International rule of law implies *domestic*, rights-based, constitutional limits on state power.
>
> 5. The erosion of domestic, rights-based, constitutional limits on state power therefore implies a decline in international rule of law.

This conception of IROL provides criteria with which to assess whether the international rule of law is rising or declining. To the extent that the behavior of governments erodes fundamental human rights, the international rule of law declines. The greater the loss of respect for rights, and larger the number of states in which it occurs, the greater the decline in IROL. Clearly, this conception of a rights-based international rule of law entails a fundamental normative commitment to the primacy

[4] What global, rights-based constitutionalism lacks, as compared with domestic constitutionalism, is a fully developed mechanism for judicial review of government acts to ensure their conformity with individual rights and freedoms. Elsewhere I have argued that a rudimentary and decentralized form of rights review is emerging at the international level in the regional human rights courts and the Human Rights Committee and visible in the judicial dialogue among them; see Sandholtz (2019).

[5] Waldron goes even further. He argues that states are generally charged with implementing or enforcing international law. States are therefore "recognized by IL as trustees for the people committed to their care" (Waldron 2011, 325, 328). One need not go as far as Waldron in order to accept the point that domestic regimes have primary responsibility under international law for respecting, and ensuring respect for, international rights-based limits on state power.

and universality of human dignity, liberty, and rights. Such a normative commitment will not be acceptable to everyone. In its defense, I would point out that it avoids the danger, inherent in thin conceptions of both domestic and international rule of law, of majoritarian (including populist) repression. The existence of law is no longer sufficient for the rule of law.

4. Populism, authoritarianism, and the erosion of the rule of law

The linkages between domestic and international rule of law imply that the decay of domestic rights-based rule of law directly implies a decline in rights-based international rule of law. It would be impossible to develop and assess that claim across the full panoply of human rights. Instead, I focus on mechanisms that are essential for effective, rights-based limitations on government power. Once these mechanisms are weakened or removed, governments have greater ability to violate the broader array of rights without political or legal consequences. The analysis thus centers on a set of three mechanisms that are crucial to limiting the powers of the state. Students of authoritarianism have identified these three as typical targets of authoritarian political strategies: an independent judiciary, a free press, and a civil society that is free to organize and participate in politics. I will argue that the resurgence of authoritarianism – assessed in terms of these three core mechanisms for checking government power – undermines international rule of law. My approach is thus concords with Kumm's observation that international rule of law can constrain national executives that seek to expand their own powers at the expense of constitutional democracy (Kumm 2003, 25).

a) Populism

Social scientists and legal scholars alike have sought to understand the current threat to international rule of law in terms of domestic political shifts driven by "populism." Though definitions of "populism" vary, a few key elements feature in many or most of them. Leaving aside some nuances, populists generally (1) criticize "elites," (2) demand that political power be returned to the authentic people (of whom the populists are the direct representatives), and (3) define the people in homogeneous, often primal terms (Abts and Rummens 2007, 409; Müller 2015, 81, 83; Müller 2016, 20; de Spiegeleire, Skinner et al. 2017, v).

There is perhaps less consensus on whether populism endangers democracy and the rule of law. Indeed, some earlier theorists argued that populism could invigorate democracy by bringing into the political arena groups and claims that had been previously excluded or marginalized. Recent work tends to reject that view (Abts and Rummens 2007, 406-407), arguing on the contrary that populism is by its nature destructive of democracy and the rule of law. Mudde and Rovira Kaltwasser offer a distinction, writing that although populism is not *per se* neither a threat nor a corrective to democracy, it is fundamentally inimical to *liberal* democracy, which in addition to free and fair elections requires protections for basic individual rights (Mudde and Rovira Kaltwasser 2017, 79-81). But, as argued above, modern constitutional democracy necessarily includes rights-based limits on state power, in which case populism would endanger democracy *per se* (that is, without modifiers). And, indeed, contemporary analysts of populism generally conclude that it implies a rejection of democracy.

Populist leaders and parties identify themselves with the homogeneous, unified, genuine "people." Anyone who opposes the populist leader and her party must therefore represent interests other than those of the true people. Political opposition is therefore by definition illegitimate: there

cannot be any valid political claims other than those defined by the general will of the real people (Abts and Rummens 2007, 419). "[A] populist regime can, therefore, only survive if it becomes authoritarian and despotic" (Abts and Rummens 2007, 421; Urbinati 1998, 122). As Müller argues, populists are not just anti-elitist but also anti-pluralist, and as "principled anti-pluralists, [populists] cannot accept anything like a legitimate opposition. . . . [P]opulists consistently and continuously deny the very legitimacy of their opponents (as opposed to just saying that some of their policies are misguided)" (Müller 2015, 85, 86). In this view, populists are necessarily authoritarians.[6] As Krieger notes, once populist parties are in power, "their strategies to govern often result in a process of constitutional retrogression implying a gradual transition from democracy to authoritarian regimes" (Krieger 2019, forthcoming, 8).

For my purposes, the details of theories of populism are not essential. What matters is that the arguments surveyed here link populism to authoritarianism, which in turn directly threatens democracy and the rule of law. We can set aside the question of whether populism is inherently authoritarian or leads to authoritarianism because in the present juncture the two are combined: the populist leaders and parties that have made political gains in various countries are unmistakably authoritarian. Indeed, for Norris, the phenomenon to be explained is "authoritarian populism" or "populist authoritarianism" (Norris 2016). Focusing on authoritarianism makes sense for four reasons. First, populism threatens the rule of law when it takes on an authoritarian character.[7] Second, authoritarian governments that are not populist contribute to the erosion of the rule of law, whereas populist governments that are not authoritarian do not necessarily do the same. Third, authoritarianism constitutes a direct threat to the rule of law because it erodes rule-of-law constraints on state authority. Fourth, we can empirically assess the development of authoritarianism and of specific components of authoritarianism.

b) Authoritarianism

Political science research on authoritarian regimes is abundant but sometimes suffers from two deficiencies. For one, it tends to focus on the characteristics and processes of authoritarian regimes rather than on the concept of "authoritarian" itself, leading to checklists of specific institutional features that identify different types of authoritarian regimes (personalist, military, and so on) (Beetham 2015; Glasius 2018). A second problem is that political science scholarship often defines "authoritarian" as a residual category: an authoritarian regime is one lacking free and fair elections. "Authoritarian" becomes synonymous with "non-democratic" (Beetham 2015; Glasius 2018). A more useful set of conceptual tools for my purposes would focus not on the institutional features of authoritarian governments but on the strategies and practices of authoritarian leaders and groups (Glasius 2018; Beetham 2015).

Beetham argues convincingly for seeing authoritarianism as a "mode of governing which is intolerant of public opposition and dissent." Authoritarian governance occurs when "rulers see public opposition as a major threat to the extent or continuation of their power, and believe that they can work to undermine it with relative impunity" (Beetham 2015, 12). Such an approach allows the analyst to evaluate authoritarian conduct within democracies, of particular importance at

[6] Or, in Mudde and Rovira Kaltwasser's formulation, though populism is not inherently a threat to democracy, it is a threat to *liberal* democracy, which is the only kind of democracy in play in this essay (Mudde and Rovira Kaltwasser 2017, 79-81).

[7] In Müller's view, populism is inherently authoritarian.

present given widespread concern about authoritarian shifts in countries that are formally and functionally democratic. Frantz and Kendall-Taylor point out that in earlier periods authoritarians often came to power through "sudden and decisive" means, often involving the suspension of democratic rules or coups d'état (Frantz and Kendall-Taylor 2017, 60). In contrast,

> Contemporary autocrats are coming to power through a process of 'authoritarianisation', or the gradual erosion of democratic norms and practices. Democratic leaders, elected at the ballot box through reasonably free and fair elections, are slowly undermining institutional constraints on their power . . . in ways that make it difficult to pinpoint the moment at which the break with democratic politics occurs (Frantz and Kendall-Taylor 2017, 60).

The key point is that authoritarianism involves measures designed to remove constraints on the exercise of state power.

Another way of putting this is that authoritarianism is identified by practices that aim to eliminate, or in Glasius's terms, "sabotage," accountability (Glasius 2018, 521). Bovens offers a useful definition of accountability: "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify is or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences" (Bovens 2007, 450). Beetham employs different terminology but the idea is the same: authoritarians seek to "render dissenters impotent by denying them access to any influence on the political process; it even goes so far as to define them as nonlegitimate players in the country's affairs" (Beetham 2015, 13). When suppression of opposition is institutionalized, an "authoritarian mode of governing" turns into "an authoritarian regime" (Ibid.). I now turn to the kinds measures that authoritarian leaders and groups employ to suppress opposition and eliminate accountability. A surprising degree of consensus surrounds the core elements of authoritarian strategy.

c) Authoritarianism and the erosion of rule of law

Analysts identify three key institutions that authoritarians tend to target in order to consolidate unaccountable power: judicial independence, which entails the institutional authority to review government acts for their consistency with basic rights; freedom of expression, especially freedom of the press; and freedom to assemble and organize, not just to contest elections but to influence government and hold it accountable through civil society organizations.

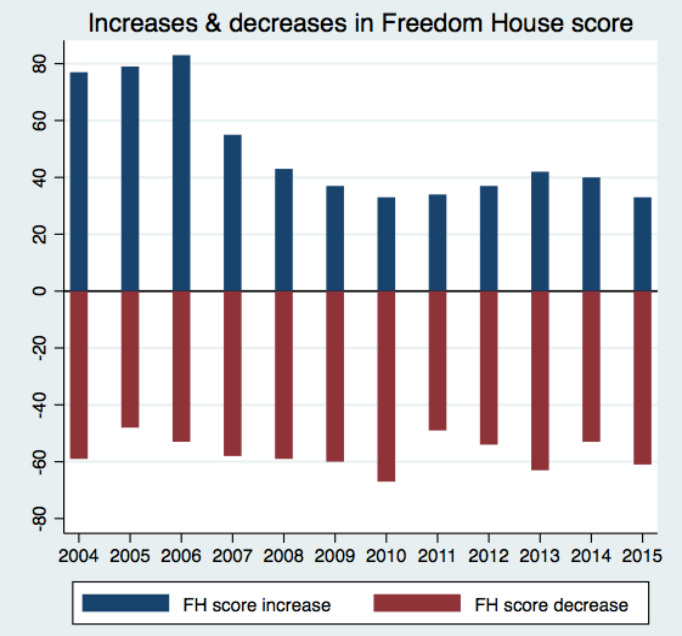
The convergence on these three elements of the rule of law (or of liberal constitutionalism, or liberal democracy) is noteworthy. Beetham, for example, declares that authoritarians can institutionalize the suppression of opposition by restricting freedom of expression (including the press) and freedom of association (civil society), and by subordinating the courts to the executive (Beetham 2015, 13). Glasius offers, as examples of sabotaging accountability, restraints placed on journalists and NGOs (Glasius 2018, 528). Müller notes that populists (authoritarians) remake the state to enlarge and entrench their power, by exerting control over the courts, intimidating or silencing the press that reports critically, and condemning or suppressing NGOs and other civil society groups that criticize the regime (Müller 2017, 11-13). Mudde and Rovira Kaltwasser similarly point out that "[a]mong the most targeted institutions are the judiciary and the media" (Mudde and Rovira Kaltwasser 2017, 81). Krieger argues along the same lines, that populist governments often seek to shrink the power of the courts to act as an independent check, "try to limit the freedom of the press," and "oppose civil society and tend to reject participatory processes of decision-making"

(Krieger 2019, forthcoming, 8). Scheppele assesses a particular kind of authoritarian, the "autocratic legalist," who uses democratic processes and legal forms to dismantle or remove the rules, institutions, or actors that "check his actions" or "hold him to account." She highlights as common elements of autocratic "reforms" the assertion of political control over the judiciary, the modification of electoral rules to guarantee legislative majorities or supermajorities, and reduction or elimination of independent media (Scheppele 2018, 549). Huq and Ginsburg view "constitutional retrogression" as having eroded democracy and the rule of law in Latin America, Eastern Europe, and Asia. Prominent among the pathways to constitutional retrogression are the elimination of institutional checks, especially through independent courts; control of information and communication, including restrictions on journalists; and curtailing the activities of lawyers, NGOs, and private foundations (Huq and Ginsburg 2018, 130-135). In line with this striking consensus on the key targets of authoritarian policies, the analysis below focuses on recent trends in judicial independence, freedom of the press and expression, and the freedom of civil society to organize and participate in public life.

5. Measuring authoritarian assaults on the rule of law

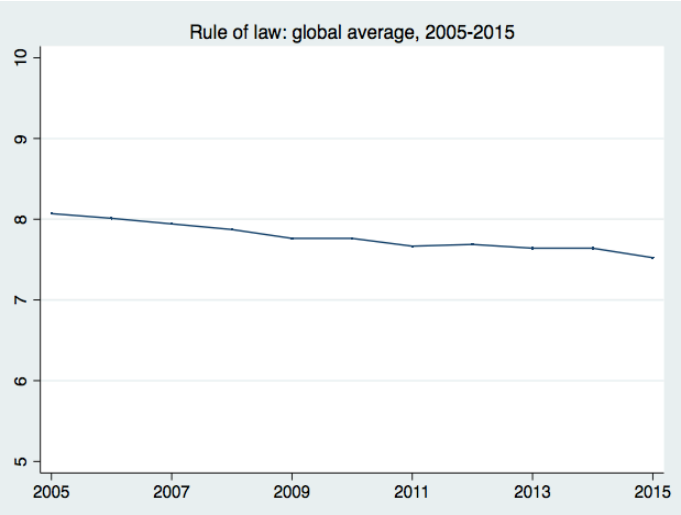
Before turning to the specific institutions and freedoms targeted by authoritarians, it might be useful to paint a broad picture of global trends in democracy and the rule of law. The most recent Freedom House report, *Freedom in the World 2018*, raises numerous alarms. As the report summarizes, "Political rights and civil liberties around the world deteriorated to their lowest point in more than a decade in 2017," marking "the 12th consecutive year of decline in global freedom" (Abramowitz 2019). These conclusions are based on global averages and naturally mask considerable cross-national variation. But the view derived from country scores is no more encouraging: in 2017, 71 countries registered declines in political rights and civil liberties while only 35 showed gains (Abramowitz 2019). Figure 1 displays the balance between states experiencing increases (blue bars) and decreases (red bars) in rights and freedoms. In every year since 2006, declines have outnumbered increases, strikingly so in the most recent years.

Figure 1



Directly relevant for my purposes, the global average for Freedom House's rule of law score has also declined steadily over the past dozen years, as shown in figure 2.[8] The rule of law indicator assesses the domestic ROL, but as I argued above, domestic rule of law and international rule of law are directly linked by common limits on government power. The following sub-sections address the more specific components of the rule of law.

Figure 2



a) Judicial independence

Authoritarians seek to weaken or eliminate institutions and mechanisms that could check their power or hold them accountable. As discussed above, students of authoritarian politics consistently identify the courts as one of the first institutions targeted by authoritarians and would-be authoritarians. Independent courts can check executive power, especially in the post-war period when judicial review has diffused globally. Judicial review entails the authority to evaluate state acts for their compatibility with a constitution or a charter of rights and to nullify acts that are found incompatible. By about 2010 the number of countries with formal judicial review had reached 160.[9] Not surprisingly, authoritarians seek to subordinate and control the courts. Authoritarian leaders can pursue various means of diminishing judicial independence, from packing the courts (appointing loyalists to the bench), to purging judges, to intimidating judges through public denunciations. The following graphs depict changes at the national level in two mechanisms for reducing the independence of the courts: political attacks on the judiciary (as a means of intimidating and bending judicial decision-making to the government's favored positions); and court packing (appointing judges known to be loyal to the government). Both show dramatic increases in states that have reduced judicial independence since about 2012.

[8] The Freedom House "Rule of Law" measure is a 16-point scale derived from questions about judicial independence; due process; protection from illegitimate use of force, including war and insurgencies; and equal treatment for all members of society (Freedom House 2019).

[9] According to Varieties of Democracy (V-Dem) data (Coppedge, Gerring, Knutsen, et al. 2018a); (Coppedge, Gerring, Knutsen, et al. 2018b).

Figure 3

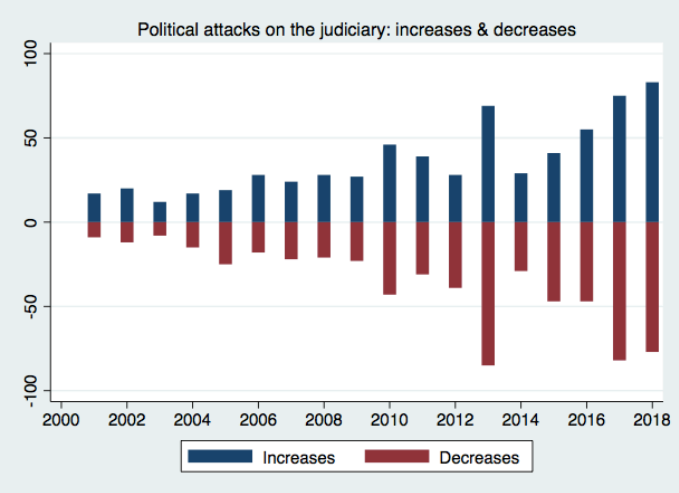
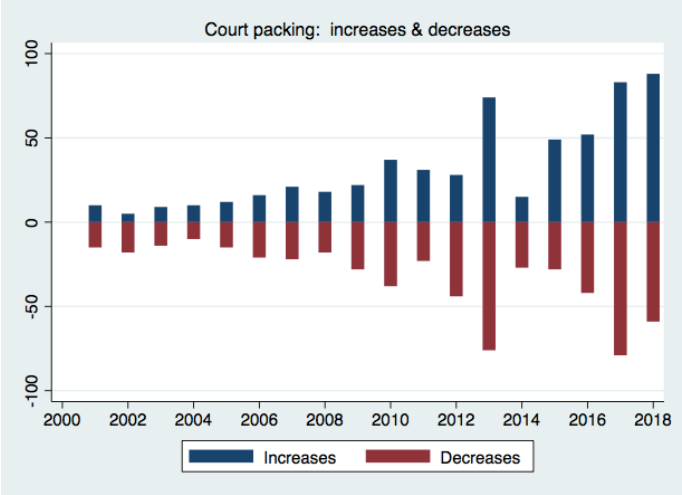


Figure 4



Which countries are most responsible for these visible shifts in the global trends? The following tables shed some light. The table shows increased political control of the judiciary through court packing in both hitherto functioning democracies (Poland, Czech Republic, Colombia, Iceland, Hungary, the United Kingdom, and Italy) and in countries already under autocratic rule (Burundi, Iran, Yemen, Syria, and Egypt). Of course, the specific situations and changes vary greatly from country to country and it is impossible here to assess the factors that figured into the scores. But it is worrisome that the shift is visible cross-nationally and across different types of political systems.

Table 1: Greatest authoritarian shifts in judicial independence, 2000 - 2018

(A) Court packing		(B) Political attacks on the judiciary	
Rank	Country	Rank	Country
1	São Tomé and Principe	1	Poland
2	Poland	2	Rumania
3	Czech Republic	3	Maldives
4	Colombia	4	Turkey
5	Georgia	5	Ukraine
6	Burundi	6	Korea, Republic of
7	Armenia	7	United States of America
8	Moldova	8	Hungary
9	Iran	9	El Salvador
10	Zambia	10	Bangladesh
11	Panama	11	Surinam
12	Iceland	12	Belgium
13	Hungary	13	Bolivia
14	Somalia	14	Kyrgyz Republic
15	United Kingdom	15	Israel
16	Yemen	16	Kenya
17	Italy	17	Brazil
18	Syria	18	Papua New Guinea
19	Egypt	19	Mexico
20	Macedonia (Former Yugoslav Republic of)	20	Yemen

Note: V-Dem data. Rankings are based on the greatest absolute increase in court packing and political attacks on the judiciary.

b) Freedoms of the press and of expression

The capacity of the public to hold government accountable depends on its ability to know what government actors are doing, which in turn requires that societal actors are able to report on, discuss, and criticize what political officials do. Citizens must be free to share what they know and to express disapproval. For that, the press (including today broadcast and digital media) must be able to investigate and report on government policies, as well as officials' misdeeds or abuse of authority. Freedom of expression and freedom of the press are therefore crucial bulwarks of democracy. And, as reported above, this is why students of authoritarianism have identified suppression of those freedoms as hallmarks of authoritarian politics.

Freedom House monitors restrictions on press freedoms around the world. In its 2017 report on press freedom, Freedom House declared, "Global press freedom declined to its lowest point in 13 years in 2016 amid unprecedented threats to journalists and media outlets in major democracies and new moves by authoritarian states to control the media, including beyond their borders" (Freedom House 2017). In its latest assessment, Freedom House concludes that "media freedom has been deteriorating around the world over the past decade, with new forms of repression taking hold in open societies and authoritarian states alike" (Repucci 2019). The following figures display in graphic form the global trends. The first (figure 5) shows the global average over time and the

second compares the number of states undergoing an increase to the number of states experiencing a decrease in press freedom (using Freedom House data). The global average has measurably declined and states with declining press freedom have substantially outnumbered those with increasing press freedom every year. Figure 6 provides another view of this data, showing the number of states in which restrictions on press freedom have increased each year and the number of states in which they have decreased. The number of increases clearly outstrips the number of decreases every year.

Figure 5

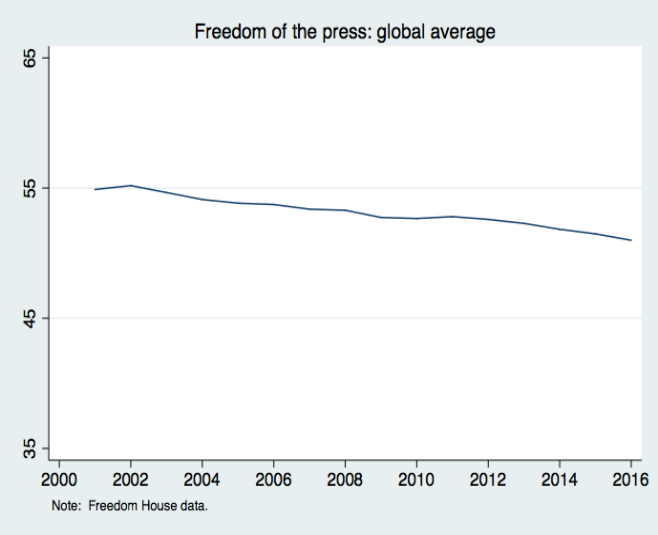


Figure 6

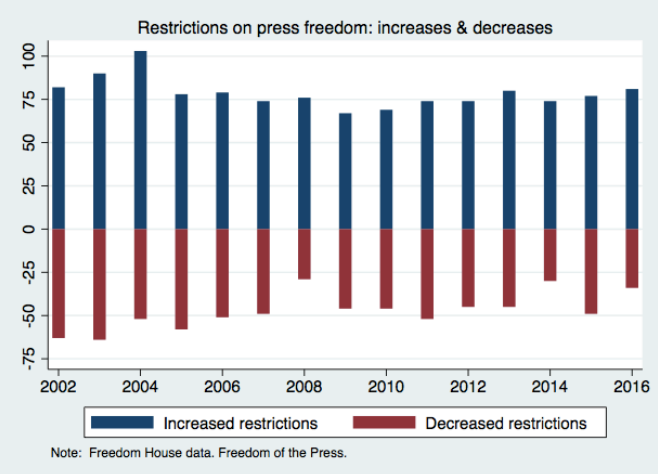
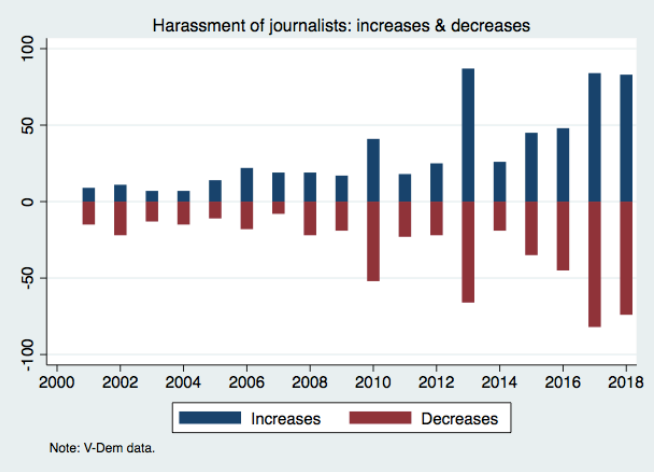


Figure 7



Another means of tracking changes in press freedom is to observe whether the harassment (defined as political attacks) of journalists is increasing or decreasing. Figure 7, using V-Dem data, depict a dramatically increasing number of states in which political attacks on journalists have increased over the previous year.

Finally, for democracy to function, ordinary citizens must have the freedom to express their views, even (or especially) when these are critical of the government. As figure 8 shows, average freedom of expression has declined globally since about the year 2000. The next figure provides a more detailed view of the number of states in which suppression of freedom of expression has increased (or decreased). Since about 2009, the number of states with more suppression of freedom of discussion has increased each year and has outstripped the number of states with less suppression.

Figure 8

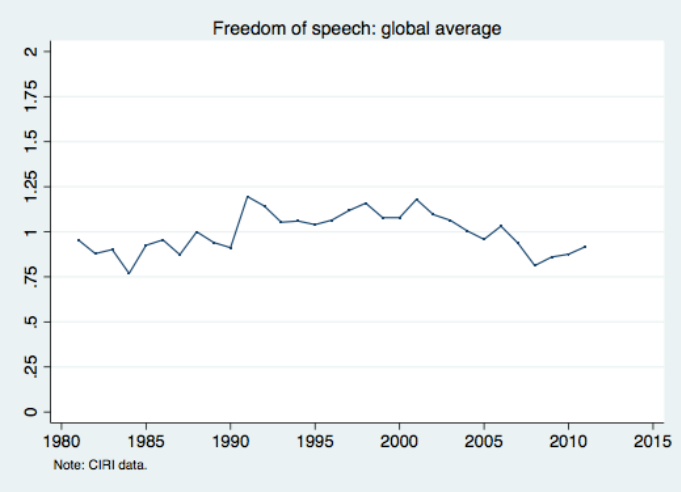
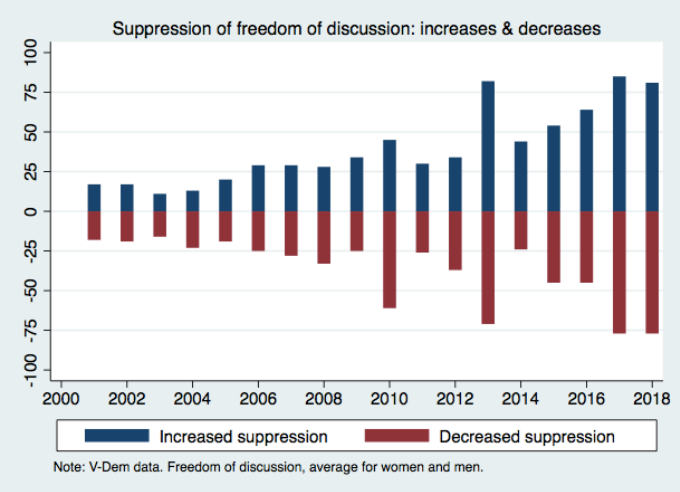


Figure 9



As with judicial independence, we can also identify the countries in which press freedoms and freedom of discussion more broadly have eroded the most. Some of the greatest shifts toward authoritarian treatment of press freedom and freedom of expression have been widely reported (Nicaragua, Burundi, Poland, Hungary, Turkey, Philippines, Venezuela). Donald Trump's ongoing rhetorical attacks on the news media have registered in the U.S. score on harassment of journalists. Developments in specific countries would be worth further investigation but for my purposes the broader trend is of central concern.

Table 2: Greatest authoritarian shifts in freedoms of the press and of expression, 2000 - 2018

(A) Political harassment of journalists			(B) Freedom of discussion	
Rank	Country		Rank	Country
1	Nicaragua		1	Nicaragua
2	Poland		2	Burundi
3	Croatia		3	Bahrain
4	Yemen		4	Eritrea
5	Hungary		5	Cameroon
6	Bangladesh		6	Thailand
7	Turkey		7	Tajikistan
8	Germany		8	Hungary
9	India		9	Turkey
10	Burundi		10	Azerbaijan
11	Bahrain		11	Venezuela
12	Austria		12	Ukraine
13	Eritrea		13	Poland
14	Greece		14	Rumania
15	Philippines		15	Uganda
16	Argentina		16	El Salvador
17	Belgium		17	Haiti
18	Cameroon		18	Comoros
19	Botswana		19	Croatia
20	United States of America		20	Slovakia

Note: V-Dem data. Rankings are based on the greatest absolute increase in harassment of journalists and decrease in freedom of discussion.

c) Civil society and NGOs

Authoritarians employ various means of stifling dissent and suppressing groups that might expose their abuses and thus motivate opposition. At the broader level, they impose restrictions on the ability of civil society actors to organize and publicly advocate for change. In other words, they constrict freedom of association and assembly. Erosion of the freedom of association and assembly has been significant enough in some states to reduce the global average, according to Freedom House data, as shown in figure 10. Throughout the period shown, the number of countries in which government restrictions on freedom of association and organization have increased outnumbered those in which such restrictions

have decreased. We can also observe the decline in a more specific indicator, measuring the extent to which governments restrict the ability of civil society organizations (CSOs) to function in public life (figure 11). The number of states in which government has expanded its control over the ability of CSOs to participate in public life has risen dramatically since 2009.

Figure 10

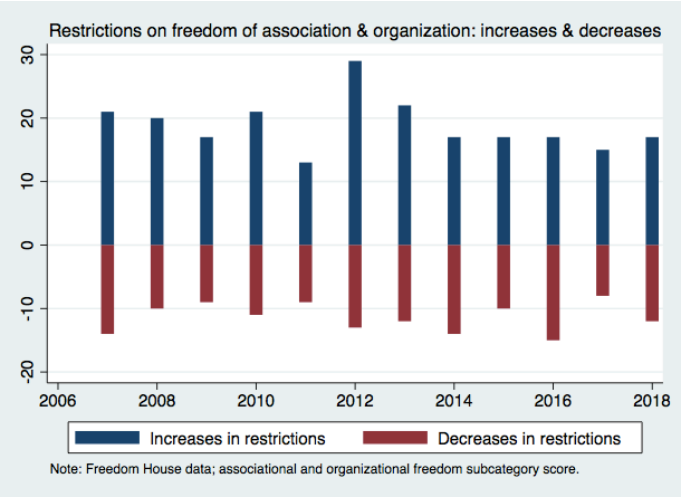
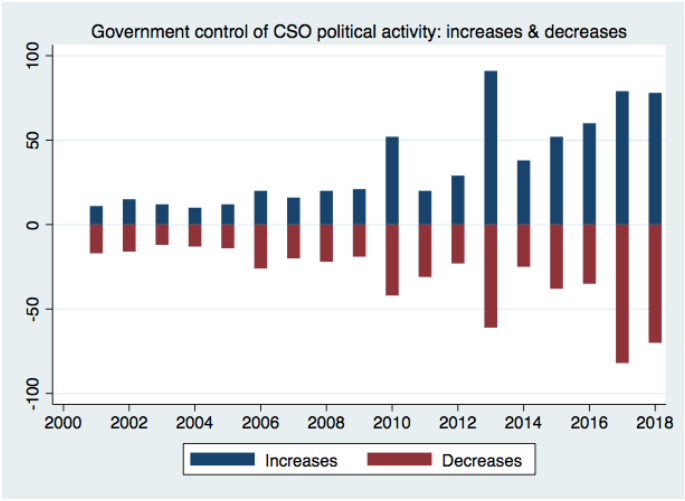


Figure 11



Krieger has analyzed this trend as a potential erosion of international legal norms: "On the bases of their antagonistic anti-establishment stance and their holistic identity politics populist governments share the goal of restricting NGO activity as well as the tendency to resist the spread of global norms through civil society" (Krieger 2019, forthcoming, 21). More specifically, the authoritarian effort to reduce or eliminate the ability of civil society groups to hold government accountable has taken the form of policies that choke off international sources of financial support for NGOs, especially human rights NGOs (Krieger 2019, forthcoming, 22; Huq and Ginsburg 2018, 50). Restrictions on foreign funding of pro-democracy NGOs started in Russia and China in the early 2000s (Carothers 2006, 56). The practice then spread. One study identified 39 countries (out of 98)

that had enacted restrictions on foreign funding of NGOs and 12 that prohibited it (Christensen and Weinstein 2013, 80).

The performance of specific countries in both freedom of association broadly and in restrictions on CSOs is informative as to the breadth and sources of the global trends. The following table shows fewer surprises, in the sense that established democracies do not appear among the states most actively retreating from these rights.

Table 3: Greatest authoritarian shifts in freedoms of association

(A) Freedom of association and organization, 2006-2018			(B) Freedom of CSOs to participate in public life, 2000-2018	
Rank	Country		Rank	Country
1	Central African Republic		1	Nicaragua
2	Venezuela		2	India
3	Honduras		3	Yemen
4	Bahrain		4	Burundi
5	Thailand		5	Uganda
6	Turkey		6	Somalia
7	Ecuador		7	Tajikistan
8	Kyrgyz Republic		8	Bahrain
9	Nicaragua		9	Thailand
10	Burundi		10	Uruguay
11	Mali		11	Iran
12	Kazakhstan		12	Cambodia
13	Russia		13	Brazil
14	Cambodia		14	Hungary
15	Congo		15	South Africa
16	Democratic Republic of Congo		16	Ethiopia
17	Bangladesh		17	Costa Rica
18	Ethiopia		18	Russia
19	Fiji		19	Austria
20	Mexico		20	Hong Kong

Note: Freedom House (association) and V-Dem (CSOs) data. Rankings are based on the greatest absolute decreases in freedom of association and freedom of CSOs to participate in public life.

d) Combining the indicators of authoritarian resurgence

The individual indicators explored so far paint a picture of the breadth and diversity of the authoritarian resurgence. States of all types, and from all regions of the world, have enacted at least some parts of the authoritarian script. That script involves suppressing or eliminating potential means of exposing, criticizing, or opposing government actions. Of course, some countries might experience a decline in one or two of the indicators of authoritarian practices but hold steady or even improve in others. Have some states, in contrast, adopted the authoritarian playbook more completely? The preceding sections explored multiple indicators, six of which I assess jointly, including two each from each category:

Indicators of authoritarian practices

Judicial independence

Political attacks on the judiciary
Court packing

Freedom of expression and the press

Harassment of journalists
Suppression of freedom of discussion

Freedom of association and organization

Freedom of association
Suppression of CSOs

The following table lists the states that showed declines in five or all six of the indicators between 2007 and 2018.[10] The first column shows the number of indicators registering a shift toward more authoritarian practices in each country. Of course, the significance of that number depends on the starting point (whether the country had a strong democratic government or an authoritarian regime in 2007) and the extent of the drop toward authoritarianism. The next three columns provide that context, displaying the average of the six indicators in 2007 and in 2018, plus the decline in that average. Countries are ordered by their average score as of 2007, from higher to lower. The table is divided into three sections. The top group of includes countries that were solidly democratic in 2007. Most of these democracies experienced relatively minor declines in the average score (less than 0.5). The averages for United States and Brazil dropped more substantially, in the U.S. case due to a dramatic increase in attacks on the judiciary and a sizeable increase in the political harassment of journalists. Hungary and Poland moved even more decisively toward authoritarianism, with declines in the average score of well over one point. The data thus fit with a general qualitative assessment of increasing authoritarianism in Hungary and Poland.

In the middle of the table are intermediate regimes, with some democratic forms but strong elements of authoritarianism (average scores between 0 and 1) already in 2007. Several of these semi-authoritarian regimes have shifted dramatically toward even greater authoritarian suppression of the three accountability mechanisms (courts, the press, and civil society). Turkey has strikingly increased authoritarian practices, showing the largest decline in average score (1.69). Zambia, India, and Serbia have also become more decisively authoritarian. Finally, states in the bottom portion of the table were strongly authoritarian in 2007 and became even more deeply authoritarian in the years since.

The data on increasing authoritarian practices reinforce the need for active resistance to authoritarianism, not just in countries already affected by it but even in historically democratic states.

[10] The assessment begins in 2007 because one of the variables, Freedom House's measure of freedom of association and organization, is only available from that year forward.

Table 4: Authoritarian practices, six indicators, 2007 - 2018

	Number of indicators showing authoritarian shift	Average, 6 indicators, 2007	Average, 6 indicators, 2018	Change in average, 2007 - 2018
Germany	5	2.28	1.88	-0.40
USA	5	2.25	1.45	-0.81
Finland	5	2.23	1.92	-0.32
Costa Rica	5	2.16	1.77	-0.39
United Kingdom	5	2.07	1.72	-0.35
Austria	5	1.99	1.32	-0.67
Spain	5	1.86	1.57	-0.29
Hungary	6	1.62	0.37	-1.26
Poland	6	1.60	-0.05	-1.64
Brazil	5	1.57	0.81	-0.76
Greece	5	1.55	1.12	-0.44
Zambia	6	1.00	0.10	-0.90
India	5	0.97	0.25	-0.72
Serbia	6	0.96	0.02	-0.94
Mali	5	0.89	0.45	-0.44
Tanzania	5	0.76	0.26	-0.50
Bosnia-Herzegovina	5	0.75	0.55	-0.20
Guatemala	5	0.65	0.35	-0.29
Mauritania	5	0.64	0.04	-0.59
Ukraine	5	0.62	0.11	-0.51
Israel	5	0.57	0.06	-0.52
Philippines	5	0.54	0.25	-0.29
Cameroon	6	0.38	-0.37	-0.75
Russia	5	0.31	0.08	-0.23
Algeria	5	0.15	0.04	-0.11
Turkey	6	0.10	-1.59	-1.69
Nicaragua	6	-0.05	-1.35	-1.30
Yemen	5	-0.05	-1.28	-1.23
Kazakhstan	5	-0.08	-0.29	-0.22
Cambodia	6	-0.28	-0.95	-0.66
Burundi	6	-0.60	-2.09	-1.50
Iran	5	-0.60	-1.08	-0.48
Egypt	5	-0.69	-0.99	-0.30
Azerbaijan	6	-0.88	-1.40	-0.52
Equatorial Guinea	5	-1.50	-1.76	-0.26

Note: Each of the six indicators is measured on a scale ranging from about -3 to about 3, where higher numbers represent greater freedom. The scale is roughly comparable to a standardized distribution, with a mean of 0 and a standard deviation of 1.

6. Conclusions

I argued for a thick conception of international rule of law, grounded on legal limits on the powers of the state. This conception of the rule of law ties together domestic and international levels: both domestic constitutions and international treaties establish limitations on state power, limitations derived from the dignity and freedom of each person. Authoritarian politics target such limitations on state power, as authoritarians seek to weaken or eliminate independent mechanisms for holding them accountable. Political science research on authoritarianism converges on three such mechanisms that are regularly suppressed or destroyed by authoritarian regimes: judicial independence, freedom of expression and of the press, and freedom of association and organization in civil society.

The data – with two indicators for each accountability mechanism – demonstrated that the number of states showing erosion has increased dramatically in recent years, outnumbering states displaying improvement. The undermining of accountability mechanisms has occurred in the well-known "backsliders" (Hungary, Poland, Turkey, India, Philippines, Brazil) but also in some more established democracies (United States). Entrenched authoritarians have also strengthened their hold (Azerbaijan, Burundi, Cambodia, Egypt, Iran). The authoritarian dismantling of limitations on state power constitutes, in itself, an erosion of international rule of law, as I have defined it.

But authoritarian resurgence should also be seen as a threat to a more narrowly defined international rule of law. For example, Krieger and Nolte conceptualize international rule of law as the interconnected set of international legal rules regulating international affairs in the decades after 1990 (Krieger and Nolte 2016, 8-10). They ask whether "contemporary forms of violations [of international law] are unusual in the sense that they call basic rules, or even the functioning of the system itself, into question" (Krieger and Nolte 2016, 10-11). Even on the basis of this more specific, restricted definition of IROL – the post-1990 international legal order – the implications of authoritarian resurgence are worrisome. National support for, and compliance with, international legal orders – in trade, investment, the environment, threats to the peace, and human rights – depends on domestic compliance constituencies. Compliance constituencies are actors and groups that benefit from and support a state's continued participation in and general compliance with international legal regimes. Such constituencies include firms that engage in international trade or investment, and their workers. They include civil society organizations that favor international environmental protections, as well as firms that invest in "green" technologies and markets. They include NGOs that lobby and litigate on behalf of human rights.

Authoritarian practices degrade the ability of domestic compliance constituencies to criticize or oppose government policies that violate international legal rules that such constituencies favor. As political accountability erodes, authoritarian governments have more leeway to disregard or undermine international legal structures without facing domestic political consequences.

Political science research also provides suggestive evidence that authoritarian regimes are less likely than democracies to fully participate in and comply with the rules of international institutions. At the most fundamental level, authoritarian resurgence raises concerns about international peace and stability. One of the clearest and most stable empirical findings in international relations research concerns the "democratic peace": democracies do not fight each other (O'Neal and Russett 1999; Bennett and Stam 2004, chap. 5). As the proportion of democracies in the world declines, the potential for armed conflict between other types of dyads (democracy-

autocracy, autocracy-autocracy) increases. Research has also shown that international organizations composed mostly of democracies contribute significantly more to peaceful conflict resolution than do IOs that are less populated by democracies (Pevehouse and Russett 2006; Hasenclever and Weiffen 2006). Rising authoritarianism implies a declining share of democracies in international organizations, which in turn may diminish their capacity to promote conflict resolution. Finally, there is also evidence that authoritarian regimes are generally less inclined than democracies to participate in international institutions; they are both less likely to join and more likely to withdraw (Mansfield and Pevehouse 2006; Mansfield and Pevehouse 2008). Though more research needs to be done, there is sufficient evidence to suggest that resurgent authoritarianism is likely to erode international rule of law, even when this is defined as the post-1990 set of international legal regimes.

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The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

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